FAHRI, AZZAT & CO & ANOR v. LEMBAGA KELAYAKAN PROFESION UNDANG-UNDANG

COURT OF APPEAL, PUTRAJAYA
SEE MEE CHUN JCA
WONG KIAN KHEONG JCA
AHMAD FAIRUZ ZAINOL ABIDIN JCA
[APPEAL NO: W-02(A)-1919-11-2023]
9 DECEMBER 2024

Abstract – *(i) There is no bar to the applicants filing a judicial review application where the decision being challenged is not a decision within the meaning of s. 26(1) of the Legal Profession Act 1976 ('LPA'); (ii) A statutory body such as the Legal Profession Qualifying Board only has powers and duties conferred upon it by the LPA and it has to act within those powers. When it decided to abolish articled clerkship, it would have gone beyond its powers as such power lay with Parliament.*

ADMINISTRATIVE LAW: *Judicial review – Dismissal of – Appeal against – Decision of Legal Profession Qualifying Board ('Board') rejecting application for registration of articled clerkship – Whether applicants failed to exhaust recourse of remedies under Legal Profession Act 1976 ('LPA') – Whether s. 26 of LPA bar to judicial review application – Whether Board exercised its statutory function under LPA – Whether applicants failed to comply with requirements under Legal Profession (Articled Clerks) Rules 1979*

LEGAL PROFESSION: *Qualifying Board – Articled clerkship – Application for registration of articled clerkship rejected by Legal Profession Qualifying Board – Whether applicants failed to exhaust recourse of remedies under Legal Profession Act 1976 ('LPA') – Whether s. 26 of LPA bar to judicial review application – Whether Board exercised its statutory function under LPA – Whether applicants failed to comply with requirements under Legal Profession (Articled Clerks) Rules 1979*

This was an appeal by the appellants against the decision of the High Court in dismissing its judicial review ('JR') application. The JR application was against the decision of the respondent dated 5 August 2022 not to accept the second appellant's articled clerk application premised on the respondent's decision at a Board meeting on 8 January 1985 to abolish articled clerkship as a mode of entry into the legal profession. The respondent was a body established under s. 4 of the Legal Profession Act 1976 ('LPA'). The first appellant, a firm of advocates and solicitors ('firm'), offered the second appellant the position of articled clerk which he accepted. The second appellant furnished the supporting documents for the purpose of registration of the articled clerkship. The second appellant formally executed an instrument of clerkship, confirming the second appellant's appointment as an

A articled clerk under the tutelage of the firm. The firm sent a letter to the respondent with the registration application. The articled clerkship application, however, was rejected by the respondent, resulting in the ensuing JR application. The High Court, in dismissing the JR application, held, *inter alia:* (i) the applicants failed to exhaust the recourse or remedies
B under the LPA and should not be permitted to pursue the judicial review application; and (ii) the applicants failed to comply with the requirements under the Legal Profession (Articled Clerks) Rules 1979 ('1979 Rules'). Hence, this appeal. The issues that arose, *inter alia*, were (i) whether s. 26 of the LPA is a bar to a JR application; and (ii) whether the respondent had
C exercised its statutory function under the LPA.

Held (allowing appeal; setting aside order of High Court)
Per See Mee Chun JCA delivering the judgment of the court:

(1) Section 26(1) of the LPA is limited to decisions of the respondent with regard to individual applications. For instance, s. 21 relates to refusal
D of special leave of an advocate and solicitor of less than seven years to be a principal; s. 22 deals with discharge of an articled clerk for unfitness; while s. 23 deals with discharge generally. This was apparent from the requirements in s. 26(5) which requires the submission of a confidential report of the applicant. If these were not related to
E individual suitability and qualification, there would be no necessity for such confidential report. Those decisions stand in sharp contrast to the instant application which deals with a policy decision of the respondent to do away with articled clerkship as a mode of entry into the legal profession. (paras 34 & 35)

F **(2)** The reliefs sought by the appellants here, namely to grant the *certiorari* to quash the decisions dated 5 August 2022 and 8 January 1985 and the declarations that such decisions contravened the LPA and the 1979 Rules were orders which the court could not make. This goes back to s. 26(7) of the LPA where the judge in a s. 26(1) application can only
G 'make any order under this Act'. Thus, there was no bar to the appellants filing the JR application where the decision being challenged is not a decision within the meaning of s. 26(1) of the LPA. The reliefs being sought by the appellants were reliefs which the High Court could not grant. (paras 39 & 43)

H **(3)** It could not be gainsaid that the functions of the respondent contained in s. 5(b) and (c) of the LPA in relation to articled clerks are duties which the respondent shall and is mandated to carry out. A statutory body such as the respondent only has powers and duties conferred upon it by LPA and it has to act within those powers. When it decided to
I abolish articled clerkship, it went beyond its powers as there was no such power in the LPA for it to do so. Such power lay with Parliament.

There was nothing in the LPA which conferred on the respondent the power to abolish articled clerkship. Inasmuch as the respondent may have discretion in the manner and extent of the execution of articled clerkship, this could not extend to its abolition, which was only vested in Parliament. Thus, the respondent acted *ultra vires* LPA when it did not exercise its statutory duty and instead abolished articled clerkship. (paras 52 & 55-56)

(4) The abolition of articled clerkship rendered all provisions in LPA pertaining to it, otiose. These provisions were ss. 5(b) and (c), 6(2)(b) to (f) and 20 to 25. This was an irrational and unreasonable decision in the *Wednesbury* sense. Other than rendering the articled clerkship provisions in LPA otiose, the respondent had not performed its statutory function, the decision to abolish was not made public and the decision was made soon after the legislative insertion of s. 25(2) which showed Parliament's intention to continue and not abolish. (para 60)

(5) When the respondent dismissed the articled clerkship application by letter dated 5 August 2022, the reason provided was the abolition of articled clerkship as decided in a meeting held on 8 January 1985 ('first reason'). In the course of the JR proceedings, another reason was provided in the respondent's affidavit in reply ('second reason') which was in relation to the appellants' failure to comply with the 1979 Rules. There was indeed non-compliance with the 1979 Rules in which the proposed articles of clerkship were executed and effective on 7 July 2022 whereas the 1979 Rules required it to come into effect on the date of registration by the respondent; the articles were not proposed as it had already been executed and effective and the required documents were submitted by the firm and not the second appellant. However, even if the second reason was true, the fact remained that there was a delay of six months from the day of the 5 August 2022 letter dismissing the application to the day of the second reason. The fact that it took six months for the second reason to emerge would even support the appellants' contention that this was an afterthought as this true reason should have been the one and only reason to be disclosed at the time of dismissing the application. The second reason that there was non-compliance with the 1979 Rules would in fact mean that articled clerkship had not been abolished and this would be in turn contrary to the first reason. At its highest, the second reason only meant that the appellants would not be able to obtain the relief for a *mandamus* to compel the respondent to register the second appellant as an articled clerk. To that extent, the respondent could not be forced to accept an application which did not comply with the 1979 Rules. However, this could not negate the first reason which was still staring at the court; and the earlier finding that the abolition of articled clerkship was unreasonable and irrational still stands. (paras 62-74)

Case(s) referred to:

Awang Tengah Ag Amin v. Sabah Public Service Commission & Anor [1998] 2 CLJ Supp 409 HC ***(refd)***

Benjamin William Hawkes v. PP [2020] 8 CLJ 267 FC ***(refd)***

Chan Kwai Chun v. Lembaga Kelayakan [2002] 3 CLJ 231 CA ***(refd)***

Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Loganathan PL Suppiah v. Lembaga Kelayakan Profession Undang-Undang Malaysia [1997] 3 CLJ 914 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Persatuan Pegawai-pegawai Bank Semenanjung Malaysia (ABOM) v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors [2014] 5 CLJ 562 CA ***(refd)***

R (On The Application Of B) v. Merton London Borough Council [2003] 4 All ER 280 ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

The State Minerals Management Authority, Sarawak & Ors v. Gegah Optima Resources Sdn Bhd [2020] 6 CLJ 279 CA ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 3

Legal Profession Act 1976, ss. 4, 5(b), (c), (e), 6(2)(b), (c), (d), (e), (f), 7, 10, 20, 21, 22, 23, 24, 25(1), (2), 26(1), (5), (7)

Trade Unions Act 1959, s. 71A(1)(3)

For the appellants - Shanmuga Kanesalingam, Joshua Wu Kai-Ming, Jowyn Saw & Sabrina Ameen; M/s Fahri, Azzat & Co

For the respondent - Khoo Guan Huat & Muhammad Danial Ahmad Terrirudin; M/s Skrine

Watching brief for the Bar Council - Farez Jinnah; M/s Farez Jinnah

[Editor's note: For the High Court judgment, please see Fahri, Azzat & Co & Anor v. Lembaga Kelayakan Profesion Undang-Undang [2024] CLJU 152; [2024] 1 LNS 152 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

See Mee Chun JCA:

Introduction

[1] "Law degree Good, Articled Clerkship Better" was an article dated 10 June 2022 published in a blog "From The Bar Stool". The second appellant read the article, prompting him to apply for articled clerkship with the first appellant. Before the articled clerkship could take off, the respondent rejected the second appellant's application.

[2] This is an appeal by the appellants/plaintiffs against the decision of the High Court (HC) dated 16 November 2023 in dismissing its judicial review (JR) application. The JR application was against the decision of the respondent dated 5 August 2022 not to accept the second appellant's articled clerk application premised on the respondent's decision at a Board Meeting on 8 January 1985 to abolish articled clerkship as a mode of entry into the legal profession.

[3] The reliefs sought by the appellants are as follows:

(1) Bahawa Pemohon-Pemohon diberikan kebenaran untuk memohon suatu perintah *certiorari* untuk membatalkan keputusan Responden dalam bentuk surat bertarikh 5 Ogos 2022 bernombor rujukan LKPU.100-2/15/J1(1)/(22-321) ('Keputusan Responden') atas alasan bahawa Keputusan Responden adalah menyalahi undang-undang, melebih kuasa, tidak munasabah atau merupakan penafian terhadap jangkaan sah Pemohon-Pemohon atau kesemuanya atau sebahagian daripadanya;

(2) Bahawa Pemohon-Pemohon diberikan kebenaran untuk memohon suatu perintah *certiorari* untuk membatalkan keputusan Responden yang telah dibuat di mesyuarat 8 Januari 1985 ('Keputusan 8 Januari 1985') atas alasan bahawa Keputusan 8 Januari 1985 adalah menyalahi undang-undang, melebihi kuasa, tidak munasabah atau merupakan penafian terhadap jangkaan sah Pemohon-pemohon atau kesemuannya atau sebahagian daripadanya;

(3) Bahawa Pemohon-Pemohon diberikan kebenaran untuk memohon suatu deklarasi bahawa Keputusan Responden adalah menyalahi Akta Profesion Undang-Undang 1976 dan Kaedah-Kaedah Profesion Undang-Undang (Kerani Berartikel) 1979;

(4) Bahawa Pemohon-Pemohon diberikan kebenaran untuk memohon suatu deklarasi bahawa Keputusan 8 Januari 1985 adalah menyalahi Akta Profesion Undang-Undang 1976 dan Kaedah-Kaedah Profesion Undang-Undang (Kerani Berartikel) 1979;

(5) Bahawa Pemohon-Pemohon diberikan kebenaran untuk memohon suatu perintah larangan bagi tujuan untuk menghalang Responden daripada mengguna pakai Keputusan Responden di mesyuarat 8 Januari 1985 kerana Keputusan menyalahi Akta Profesion Undang-Undang 1976 dan Kaedah-Kaedah Profesion Undang-Undang (Kerani Berartikel) 1979;

(6) Bahawa Pemohon-Pemohon diberikan kebenaran untuk memohon suatu perintah *mandamus* yang mengarahkan Responden untuk mendaftaraikan kemasukan Pemohon Kedua dalam artikel selaras Akta Profesion Undang-Undang 1976 dan Kaedah-Kaedah Profesion Undang-Undang (Kerani Berartikel) 1979 dalam masa 14 hari dari tarikh penghakiman permohonan ini;

A **Parties And Background Facts**

[4] The respondent is a body established under s. 4 of the Legal Profession Act 1976 (the LPA).

[5] The first appellant is a firm of advocates and solicitors (the firm). On
B 30 June 2022, the firm offered the second appellant the position of articled clerk, which he accepted. On 1 July 2022, the second appellant furnished the supporting documents for the purpose of registration of the articled clerkship.

[6] On 7 July 2022, the second appellant formally executed an instrument of clerkship, confirming the second appellant's appointment as an articled
C clerk under the tutelage of the firm.

[7] On 29 July 2022, the firm sent a letter to the respondent with the registration application. On 5 August 2022, the articled clerkship application was rejected by the respondent. This resulted in the ensuing JR application, which was dismissed by the HC, leading to this appeal.

D **Decision Of The HC**

[8] The grounds of judgment (GOJ) of the HC dated 29 January 2024 can be found in encl. 3/34-54.

[9] The HC dealt with the preliminary objection (PO) raised by the
E respondent that the JR application was premature and defective as the appellants had not exhausted the grievance procedure before resorting to judicial review.

[10] The HC noted this was a challenge on the decision of the respondent,
F which rejected the application of the firm to register the second appellant as an articled clerk. Reference to s. 26 of the LPA was made where sub-s. (1) provides that "Any person dissatisfied with any decision of the Board may apply to a judge for a review of the decision".

[11] In paras. 18 to 20, the HC stated the following:

G
> 18. Section 26 of the LPA above clearly shows that there are provisions in the LPA for appeals against the decisions of the Respondent. The Applicants cannot unilaterally ignore this avenue of appeal. In choosing to do so, this judicial review application is defective.
>
> 19. It is my view that since the subject matter concerned is the decision
> H of the Respondent, instead of applying to a Judge for a review of the decision by way of originating summons, the Applicants had short circuited by filing the judicial review application to this Court.
>
> 20. Therefore, it is my view that the Applicants therein are not entitled to initiate a judicial review proceedings against the Respondent
> I herein as the Appellants had failed to exhaust the grievance procedure under Section 26 of the LPA before filing this judicial review application before this Court.

[12] The HC referred to *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505 for the proposition that the existence of a statutory appeal is a bar to judicial review. A

[13] The HC thus found that the PO had merits and the respondent's objection was upheld (para. 26 GOJ).

B

[14] For completeness, the HC went on to consider the merits of the JR application.

[15] The HC found that the appellants had failed to comply with the requirements under the Legal Profession (Articled Clerks) Rules 1979 (the 1979 Rules). This was what was stated: C

> 28. Upon perusal of the cause papers filed before this Court, I find that the Applicants have failed to comply with the requirements under the 1979 Rules. It is clear from the Respondents' Affidavit in Reply that the application has been declined due to the Applicants' noncompliance with several rules, notably Rules 3 and 4 of the 1979 Rules, among others: D
>
> (a) Instead of the 2nd Applicant, it was the 1st Applicant who purported to produce the documents under Rule 3;
>
> (b) Among other documents produced was a copy of "articles" that had been executed by the Applicants, not the proposed articles as required under the 1979 Rules; and E
>
> (c) The "articles" that had been executed by the Applicants had provided for a date when the articles commenced. This is contrary to the 1979 Rules which provide that the date of registration of articles shall be when the articles are registered and not when the articles are signed/executed. F

[16] At para. 29, the HC next stated as follows:

> 29. Given the above, I am of the view that reasons for the decision may be given at a time later when the party was notified of the decision including during proceedings. Further, it would not be fatal or the failure of the Respondent to state reasons at the material time when there is no duty to give reasons. G

[17] For this, reference was made to *The State Minerals Management Authority, Sarawak & Ors v. Gegah Optima Resources Sdn Bhd* [2020] 6 CLJ 279; [2021] 1 MLJ 268. H

[18] It was held that the respondent is not obliged to provide reasons under the LPA but it did so anyway.

[19] On the contention of different reasons being proffered on the rejection, namely, abolition of articled clerkship and subsequently, non-compliance with the 1979 Rules, the HC found thus: I

A

> 38. This Court is of the view that in any circumstance where the Respondent presents various reasons for its decision to the Applicants, this Court maintains the discretion to uphold any of the reasons by the Respondent, as long as any unfavorable reasons provided by the Respondent does not dominate the basis for the decision.

B

Reference was made to *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19.

[20] The HC acknowledged that the respondent had provided at least two distinct reasons for rejecting the application. The HC was of the opinion that
C even if the first reason was found wanting, the second reason demonstrates that the appellants' application was flawed. The appellants cannot force the respondent to accept an application that does not comply with the 1979 Rules. Refer to paras. 40 to 42 GOJ.

[21] It was also held in para. 43 GOJ that the respondent has the discretion
D to decide on the registration of a person as an articled clerk, taking into account the objectives outlined in s. 6 of the LPA.

[22] The conclusion of the HC can be seen as follows:

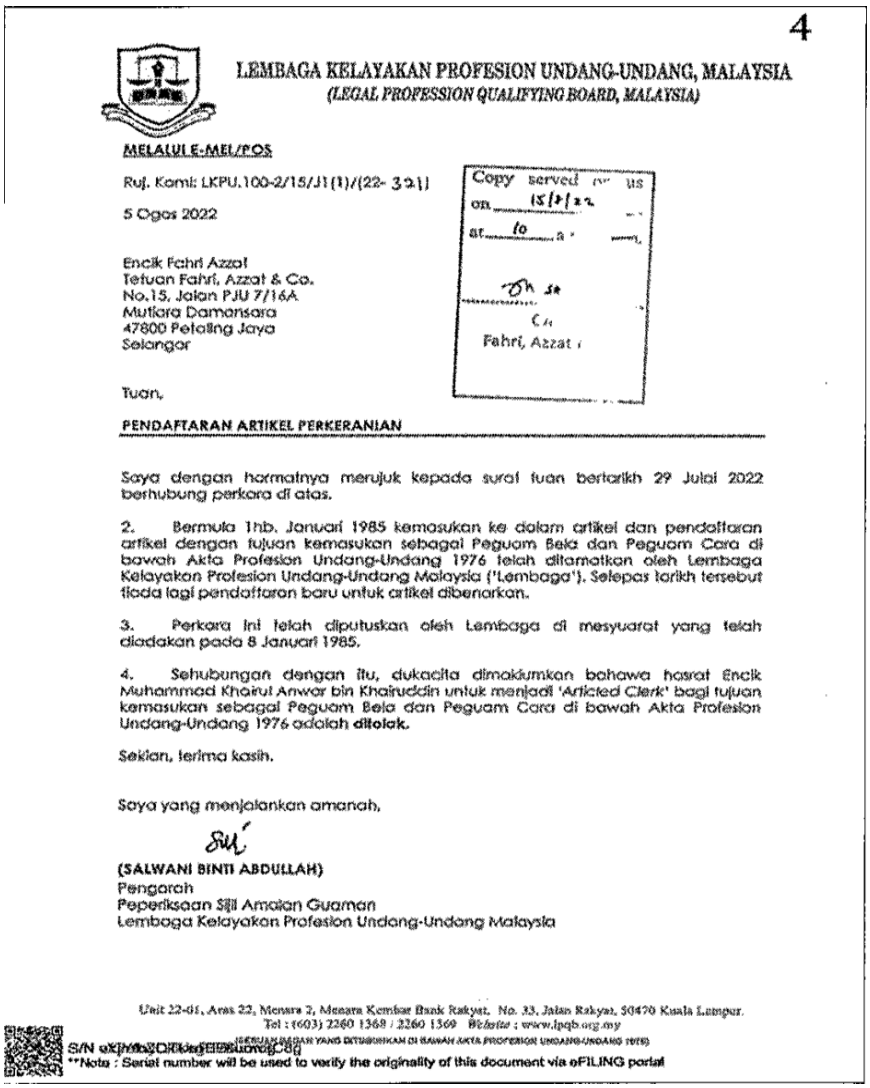
> Conclusion
>
> 47. The Applicants have failed to exhaust the recourse or remedies provided under the LPA and should not be permitted to pursue the judicial review application.
>
> 48. The Applicants have failed to comply with the requirements under the 1979 Rules and the judicial review application would be an exercise in futility as the Applicants' application is flawed.
>
> 49. The Applicant's argument that the Respondent is estopped from offering reasons other than the one on 5.8.2022 is misconceived based on the *Gegah Optima* (*supra*) decision.
>
> 50. The Respondent has not made any attempt to alter its reason but has, in fact, provided additional reasons for rejecting the Applicants' application for Article.
>
> 51. Premised on the aforesaid reasons, I am of the view that the decision of the Respondent is not tainted with any error of law, irrationality and/or unreasonableness that warrants the intervention of this Court.

E F G H

Our Decision

[23] The JR application, in essence, seeks *certiorari* to quash the decisions of the respondent dated 5 August 2022 and 8 January 1985.

I **[24]** The decision of the respondent dated 5 August 2022 is as follows:



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LEMBAGA KELAYAKAN PROFESION UNDANG-UNDANG, MALAYSIA
(LEGAL PROFESSION QUALIFYING BOARD, MALAYSIA)

MELALUI E-MEL/POS

Ruj. Kami: LKPU.100-2/15/J1(1)/(22- 321)

5 Ogos 2022

Encik Fahri Azzat
Tetuan Fahri, Azzat & Co.
No.15, Jalan PJU 7/16A
Mutiara Damansara
47800 Petaling Jaya
Selangor

Copy served on us
on 15/8/22
at 10 a.m.
Fahri, Azzat

Tuan,

PENDAFTARAN ARTIKEL PERKERANIAN

Saya dengan hormatnya merujuk kepada surat tuan bertarikh 29 Julai 2022 berhubung perkara di atas.

2. Bermula 1hb. Januari 1985 kemasukan ke dalam artikel dan pendaftaran artikel dengan tujuan kemasukan sebagai Peguam Bela dan Peguam Cara di bawah Akta Profesion Undang-Undang 1976 telah ditamatkan oleh Lembaga Kelayakan Profesion Undang-Undang Malaysia ('Lembaga'). Selepas tarikh tersebut tiada lagi pendaftaran baru untuk artikel dibenarkan.

3. Perkara ini telah diputuskan oleh Lembaga di mesyuarat yang telah diadakan pada 8 Januari 1985.

4. Sehubungan dengan itu, dukacita dimaklumkan bahawa hasrat Encik Muhammad Khairul Anwar bin Khairuddin untuk menjadi *'Articled Clerk'* bagi tujuan kemasukan sebagai Peguam Bela dan Peguam Cara di bawah Akta Profesion Undang-Undang 1976 adalah **ditolak.**

Sekian, terima kasih.

Saya yang menjalankan amanah,

(SALWANI BINTI ABDULLAH)
Pengarah
Peperiksaan Sijil Amalan Guaman
Lembaga Kelayakan Profesion Undang-Undang Malaysia

Unit 22-01, Aras 22, Menara 2, Menara Kembar Bank Rakyat, No. 33, Jalan Rakyat, 50470 Kuala Lumpur.
Tel : (603) 2260 1368 / 2260 1369 *Website* : www.lpqb.org.my
(SEBUAN BADAN YANG DITUBUHKAN DI BAWAH AKTA PROFESION UNDANG-UNDANG 1976)
S/N oKjMtsOFdegEEkuowg-3q
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[25] The decision essentially states that the first appellant's articled clerk application was rejected as the respondent had in its meeting on 8 January 1985 abolished articled clerkship as a mode of entry into the legal profession.

Preliminary Objection (PO)

Whether Section 26 Of The LPA Is A Bar To JR Application

[26] We will first deal with the PO, which found favour with the HC. The gist of the PO was that s. 26 of the LPA provided an avenue for appeal to the appellants such that they were prevented from filing the JR application where they ought to have instead appealed.

[27] Section 26 of the LPA provides as follows:

> 26 (1) **Any person dissatisfied with any decision of the Board may apply to a Judge for a review of the decision.**
>
> (2) If the Board fails to determine any request within six weeks after it has been first submitted to it, the applicant may apply under this section as if the request had been determined adversely to him.
>
> (3) Every application under this section shall be made by summons in chambers on the petition of the appellant if he has filed a petition, otherwise by originating summons; the Judge hearing the application may in his discretion adjourn the application into open Court.
>
> (4) Every summons in chambers or originating summons, as the case may be, shall be supported by evidence on affidavit and shall be served together with the affidavit on the Board; such summons in chambers or originating summons shall not be heard before the expiry of twelve days after the date of service on the Board.
>
> (5) At or before the hearing of the application the Board may submit to the Judge a confidential report on the applicant; such report shall not be filed in Court but a copy thereof shall be furnished to the applicant.
>
> (6) A confidential report under this section shall be privileged.
>
> (7) **At the hearing the Judge may dismiss the application or make any order under this Act as he considers fair and reasonable.**
>
> (8) A Judge who is a member of the Board shall not hear any application under this section. (emphasis added)

[28] Section 26 has been considered in two cases where the reverse was argued by the respondent. In those two cases, the respondent took the position that the applicant concerned should not have resorted to s. 26.

[29] In *Loganathan PL Suppiah v. Lembaga Kelayakan Profession Undang-Undang Malaysia* [1997] 3 CLJ 914, the applicant filed an application for a review under s. 26 of the LPA that the decision of the respondent to set certain papers were *ultra vires* s. 5(e) of the LPA. This provision concerns the respondent's function to provide courses of instruction for, and for the examination of, persons whose qualifications are not sufficient to make them qualified persons except after undergoing the courses and passing the examinations.

[30] The issue was whether the matter that formed the complaint of the applicant was a subject matter for review under s. 26 of the LPA. The respondent's position there was that it was not, as it was not a decision-making process contemplated by s. 26.

[31] The High Court was categorical in holding as follows at p. 922:

> ... **in the carrying out of a function under s. 5(e) of the Act, the defendant is not making any decision within the meaning of s. 26(1) of the Act**. ... (emphasis added)

[32] In *Loganathan*, the respondent was carrying out a function under s. 5(e) of the LPA. Our instant case relates to carrying out a function under s. 5(b) and (c) of the LPA, which are:

> (b) to provide courses of instruction for, and to regulate the training and instruction of, articled clerks;
>
> (c) to provide for the examination of articled clerks wishing to become qualified persons;

Both relate to the functions of the respondent.

[33] This would support the appellants' contention that the carrying out of a function under s. 5 of the LPA is not a decision within the meaning of s. 26(1) of the LPA such that they must appeal under that provision.

[34] We find and agree with the appellants' submission that s. 26(1) of the LPA is limited to the decisions of the respondent with regard to individual applications. This was illustrated by the examples provided by its counsel in *Loganathan,* which the High Court agreed with. This can be seen at p. 922:

> ... They are the provisions relating to the decision of the defendant under s. 21 when the defendant refuses special leave sought to qualify an advocate and solicitor of less than seven years standing and not in active practice to be a principal, or where the defendant discharges the articles of the articled clerk pursuant to sub-s. 4 thereof. Another instance is where the defendant discharges the articles of the articled clerk **under ss. 22 or 23 of the Act** ... Again, I share the view of En. Royan on this **in that in the carrying out of a function under s. 5(e) of the Act, the defendant is not making any decision within the meaning of s. 26(1) of the Act** for reading the said sub-section with the powers given to the Judge under sub-s. (7) thereof, ... (emphasis added)

[35] We note that those provisions relate to the decisions of the respondent in regard to individual applications made pursuant to Part II of the LPA. So, for instance, s. 21 relates to refusal of special leave of an advocate and solicitor of less than seven years to be a principal; s. 22 deals with discharge of an articled clerk for unfitness; while s. 23 deals with discharge generally. This is apparent from the requirements in s. 26(5), which requires the submission of a confidential report of the applicant. If these were not related to individual suitability and qualification, there would be no necessity for such confidential report. Those decisions stand in sharp contrast to the instant application, which deals with a policy decision of the respondent to do away with articled clerkship as a mode of entry into the legal profession.

[36] The respondent submitted that in *Loganathan*, those references to provisions of LPA, which were decisions were only examples and not conclusive. It suffices to state that the thrust of *Loganathan* is that functions of the respondent under s. 5 of the LPA are not the subject matter of an appeal under s. 26. Even if those provisions referred to by its own counsel

A are examples, those examples can point towards an intention that the mechanism in s. 26 of the LPA was designed towards decisions on individual suitability and qualification.

[37] *Loganathan* also held that there was no power in the LPA for the respondent to issue the Certificate of Legal Practice (CLP) to the applicant. B This will tie in with the appellants' contention that the respondent here has no power to grant the appellants the reliefs they seek. At p. 922, this was stated:

> .. The learned Counsel further submits that even if he was wrong in relation to the function of the defendant to provide examination not C being a decision, *but in the light of sub-s. 26(7) the plaintiff would have no remedy because the Act does not have a provision allowing the Judge to order the defendant to issue the plaintiff with a Certificate in Legal Practice as sought for by the plaintiff in this application.* The plaintiff on the other hand, made no submissions at all on this point. Again, *I share the view of En. Royan on this in that in the carrying out of a function under s. 5(e) of the Act, the defendant is not making any* D *decision within the meaning of s. 26(1) of the Act for reading the said sub-section with the powers given to the Judge under sub-s. (7) thereof, there is no power given by the Act for the Judge to make any order under it which in this case to order the defendant to issue the Certificate in Legal Practice to an aggrieved party. …*
>
> (emphasis added)

E **[38]** *Loganathan* was applied by this court in *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 3 CLJ 231. There, the applicant sought declaratory reliefs that the respondent's nullification of the results of the CLP was flawed. On the first issue of whether the reliefs prayed for fall within the scope of s. 26 of the LPA, this was said at p. 238:

F

> ... For the respondents, it is submitted none of the reliefs sought by the appellant fall within the scope of s. 26 of the Act. Under the aforesaid section, the court has jurisdiction to grant four types of remedies as specified under s. 21(1), s. 21(4), s. 22 and s. 23 of the Act, which sections do not apply to persons other than articled clerks. In support, the learned G counsel for the respondent relied on the case of *Loganathan a/l PL Suppiah v . Lembaga Kelayakan Profession Undang-Undang Malaysia* [1997] 3 CLJ 914. Tan Sri Zaki urged this court to give a purposive approach in construing s. 26 of the Act. In response, En. Karpal Singh counsel for the appellant submitted that under s. 26 of the Act, there was ample power for the court to grant reliefs sought if the court was satisfied that the respondent H (board) was not justified in nullifying the examination result. *In the court below, the learned trial judge said that in construing s. 26(1), it should be read together with s. 26(7) and he concluded that on the preliminary issue, the application could not appropriately be made under s. 26 of the Act. We agree. The operative words of s. 26(7) of the Act are "any order under this Act". On this issue, our finding is in the negative. On this ground alone, the appellant's case must fail.*
>
> I (emphasis added)

[39] Similarly, as in *Loganathan* and *Chan Kwai Chun*, the reliefs sought by the appellants here, namely to grant the *certiorari* to quash the decisions dated 5 August 2022 and 8 January 1985 and the declarations that such decisions contravene the LPA and the 1979 Rules are orders which the court cannot make. This goes back to s. 26(7) of the LPA, where the judge in a s. 26(1) application can only "**make any order under this Act**". (emphasis added)

[40] The respondent referred to *Robin Tan* and *Persatuan Pegawai-pegawai Bank, Semenanjung Malaysia (ABOM) v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2014] 5 CLJ 562; [2014] MLJU 1885, where the JR application was dismissed where the applicants had failed to exhaust the domestic remedies. In *Robin Tan*, the second leave question was "whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review or declaratory reliefs". There, s. 71A(1) of the Trade Unions Act 1959 provides that any person dissatisfied with the decision of the Director General may appeal to the Minister. Subsection (3) states that "The Minister may, after considering such appeal, give such decision thereon as he deems just and proper."

[41] At pp. 513 and 514 (CLJ); pp. 466 and 467 (MLJ), the Federal Court stated as follows:

> [16] The second question could better be described as a consequence of the first question. Section 71A has provided a remedial mechanism within the framework of the trade union legislation, that is a specific procedure whereby an appeal lies to the Minister. *The second question relates to another matter, that is since s. 71A(1) is applicable to an employer does it still permit the employer to have an option not to appeal, and additionally, instead have recourse to a court of law in order to challenge the registration.* The declaratory orders sought by the appellant would have the effect of negating the decision of the 1st respondent. By praying for the declaratory orders the appellant is in effect appealing against the decision of the 1st respondent while a specific procedure has been laid down in the Act 262. By statute a second tier has been established whereby an appeal lies to the Minister. The word used in s. 71 A(1)(b) is "may". In construing the word "may" generally, it could be contended that the word is permissive in relation to the person who is given the right to appeal in the sense that it gives the person a choice to prefer an appeal against the decision of the Registrar or not to. But in relation to the person who is to be affected by the appeal we do not see this as directory. The declaratory orders sought for seek to reverse the decision of the Registrar. Hence in that sense if an employer wishes to refute recognition then it is the mandatory procedure that is laid down that has to be resorted to for the legislation has identified the specific procedure whereby any person who is dissatisfied is to seek further recourse with the Minister if that person wishes to negate the decision of the Registrar.

A

> [17] *In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legisiation, courts are not authorised to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words, the statutory right has to be exhausted.* (emphasis added)

B **[42]** We find that the distinction in *Robin Tan* is that s. 71A of the Trade Unions Act provides the alternative remedy in that it empowers the Minister to give such order sought by the applicants. Here, *Loganathan* and *Chan Kwai Chun* have held that the reliefs sought by the appellants are not within the powers of the High Court. The decisions of *Loganathan* and *Chan Kwai Chun* are closest to our factual matrix.

C

[43] We would conclude that there is no bar to the appellants filing the JR application where the decision being challenged is not a decision within the meaning of s. 26(1) of the LPA. The reliefs being sought by the appellants are reliefs which the High Court cannot grant.

D *Exceptional Circumstances*

[44] In any event, *Robin Tan* at p. 518 (CLJ); p. 470 (MLJ) concluded:

> [25] **In the final analysis, in the absence of exceptional or appropriate circumstances the answer to the second question is in the affirmative.** This appeal is therefore dismissed with costs and the deposit goes to the respondents. (emphasis added)

E

[45] This means that even if there is a requirement to exhaust domestic remedies, there can be an exception in the form of exceptional or appropriate circumstances. This brings us to *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185. At p. 115 (CLJ); p. 189 (MLJ), the following was stated:

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> A clear principle is reiterated here *ie*, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. *Judicial review is always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.*
>
> ...
>
> In answer to the first question *we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.* (emphasis added)

G

H

[46] *Jagdis* therefore opens the door to judicial review even if there is an alternative remedy in those circumstances as listed above. The respondent had no issue with *Jagdis* but was at pains to submit that there were no such exceptional circumstances in this instance.

I

[47] In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, it was stated at pp. 94 to 96 (CLJ); pp. 39 to 41 (MLJ): A

> Speaking generally, it is right to say, that *if an applicant in judicial review proceedings can demonstrate illegality, that is to say unlawful treatment, it would be wrong to insist that he exhaust his statutory right of appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather appeal?* It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest. (*R. v. Huntingdon District Council; exp. Cowan & Anor* [1984] 1 WLR 501 (a Licensing appeal). B C
>
> ...
>
> But more to the point, in the present case, the main grounds on which the Society sought judicial review were based on distinct principles of public law or general issues of law, in particular, the Society had clearly raised an arguable case that the Council, a public body, had acted unfairly, abused its powers, and had raised the general question of the extent to which representations can bind public bodies. *These grounds involve a consideration of generalised principles of public law developed by the courts to control the exercise of power by public authorities and, as such, judicial review would be the appropriate route to follow rather than appeal.* (See *eg*, *R v. Inland Revenue Commissioners; ex p. Preston* [1985] AC 835, *R v. Board of Inland Revenue; ex p MFK Underwriting Agencies Ltd & Ors* [1990] 1 All ER 91). D E
>
> *On a further ground also, in the present case, Judicial Review rather than appeal would be the appropriate route to follow because, by their application, the Society had raised issues of Law of public importance, going beyond the significance of the case itself. In other words, the principles involved in this case were more important than the case itself.* So for example, in *R v. Huntington District Council, ex p. Cowan & Anor* [1984] 1 All ER 58, Glidewell J permitted the applicant to proceed by judicial review to impugn a licensing decision rather than have recourse to the appeal procedure in a case where the applicant was raising for the first time the question of how the local authorities were to exercise their licensing functions under a particular statute. *It was considered to be in the public interest that the court should give a ruling which would provide authoritative guidance for all local authorities. In our view, the present case, was such a case.* (emphasis added) F G

[48] The exceptional circumstances where one need not exhaust the statutory remedy are that the respondent's decision to abolish article clerkship has a wide impact on the public and not just the second appellant and s. 26 of the LPA does not empower the court to grant the reliefs sought by the appellants. H

[49] Any way, we find that the HC was not correct to uphold the PO. We would therefore dismiss the PO. I

Merits Of The JR Application

Decision Of The Respondent Not To Exercise Its Statutory Function

[50] The first ground advanced by the appellants was that the respondent had not exercised its statutory function under LPA. It will be recalled that the respondent had decided in its meeting on 8 January 1985 to abolish articled clerkship as a mode of entry into the legal profession and it had on that basis on 5 August 2022 rejected the second appellant's application.

[51] The respondent is established pursuant to s. 4 of the LPA. Section 5 of the LPA confers upon the respondent the functions with regard to articled clerkship as follows:

> **Functions of Board**
>
> 5. The Board shall have the following functions:
>
> (b) to provide courses of instruction for, and to regulate the training and instruction of, articled clerks;
>
> (c) to provide for the examination of articled clerks wishing to become qualified persons;

[52] It cannot be gainsaid that the functions of the respondent contained in s. 5(b) and (c) of the LPA in relation to articled clerks are duties, which the respondent shall and is mandated to carry out. As stated in *Benjamin William Hawkes v. PP* [2020] 8 CLJ 267, when a statute uses the word "shall", *prima facie*, it is mandatory. A statutory function, in turn, is equated to a statutory duty. Refer to s. 3 of the Interpretation Acts 1948 and 1967, where "function" is defined to include power and duty.

[53] Thereafter, there are various provisions in LPA *vis-à-vis* the respondent and articled clerks. Section 6 of the LPA provides the following:

> **General power of Board and power to make rules**
>
> 6. (1) In addition to any other powers conferred by this Act the Board may make rules and do all things which are necessary and incidental in order to carry out into effect the objects of this Part and the functions of the Board.
>
> (2) Without prejudice to the generality of subsection (1) but subject to this Part, the Board may in particular make rules -
>
> (a) ...;
>
> (b) for the taking and retaining of articled clerks by principals and for the conduct, duties and responsibilities of the parties;
>
> (c) for regulating the manner in which articled clerks serve their period of articleship;
>
> (d) specifying the subjects in which articled clerks are required to be proficient in;

(e) for the examination from time to time of articled clerks; A

(f) for the exemption of articled clerks from courses of instruction or from examination;

(g) ...;

(h) for the management and conduct of, and the exemption of certain categories of qualified persons and articled clerks from, the Bahasa Malaysia Qualifying Examination; B

(i) ...

[54] Section 10 provides that the High Court may, at its discretion, admit as an advocate and solicitor any articled clerk who has complied with s. 25. C Sections 20 to 25 are devoted entirely to articled clerks, pertaining to qualification, conditions to be principal and discharge of clerk, discharge of clerk for fitness, discharge of clerk generally, period of articles and conditions of articles and condition of admission of articled clerk. These provisions can be said to support the respondent in the discharge of its D statutory function.

[55] It is also trite law that a statutory body, such as the respondent, only has powers and duties conferred upon it by LPA and it has to act within those powers. When it decided to abolish articled clerkship, it went beyond its powers as there is no such power in LPA for it to do so. Such power lies E with Parliament.

[56] There is nothing in LPA, which confers on the respondent the power to abolish articled clerkship. We were informed that LPA has been amended seven times since 1985, the year of the decision to abolish articled clerkship, but none of these amendments abolished articled clerkship. In fact, *vide* Legal F Profession (Amendment) Act 1983, which came into force on 16 December 1983, s. 25(2) was inserted that as from 1 January 1984, no articled clerk could be admitted unless, in addition to satisfying the requirements in sub-s. (1), he has passed or is exempted from the Bahasa Malaysia qualifying examination. The latest amendment in 2016 did not touch on articled G clerkship, much less abolish it.

[57] Counsel for the respondent informed this court that during proceedings in the High Court, it was conceded that only Parliament could discontinue articled clerkship but the respondent had certain discretion to determine how H the programme could proceed. Reference was made to *Awang Tengah Ag Amin v. Sabah Public Service Commission & Anor* [1998] 2 CLJ Supp 409; [1998] MLJU 10:

> As discussed earlier in this judgment, art. 37(1) imposes a duty upon the 1st defendants to do certain functions as stated therein in connection I with members of the Sabah Public Service. *But that should not be construed as leaving the 1st defendants without any decision-making power or any element of discretion.* In *de Smith's Judicial Review of Administrative Action* (4th Edition) at p. 283-284 it is stated thus:

> *An authority may have a discretion whether to exercise a power, and a discretion in the manner of exercising it.* But discretionary powers are frequently coupled with duties.
>
> *… an apparently absolute duty cast by statute upon a public authority may be interpreted to permit the exercise of discretion in the manner and extent of its performance.*
>
> (emphasis added)

[58] Inasmuch as the respondent may have discretion in the manner and extent of the execution of articled clerkship, we find that this cannot extend to its abolition, and which, as acknowledged by counsel, is only vested in Parliament.

[59] We are thus of the considered opinion that the respondent acted *ultra vires* LPA when it did not exercise its statutory duty and instead abolished articled clerkship.

[60] Further, the abolition of articled clerkship renders all provisions in LPA pertaining to it, otiose. These provisions are s. 5(b) and (c), s. 6(2)(b) to (f) and ss. 20 to 25. This was an irrational and unreasonable decision in the *Wednesbury* sense. Other than rendering the articled clerkship provisions in LPA otiose, the respondent had not performed its statutory function, the decision to abolish was not made public and the decision was made soon after the Legislative insertion of s. 25(2), which showed Parliament's intention to continue and not abolish.

[61] The respondent contended that it would be absurd to require the enforcement of the articled clerkship provisions as the administrative and institutional infrastructure to support it has vanished. It was submitted that certain subjects which had to be taken at University Malaya were no longer offered. Be that as it may, the answer is not for the respondent to abolish articled clerkship but rather to amend the 1979 Rules to cater for that situation. It is within the control of the respondent to establish the mechanism and to enact amendments to implement a suitable course of instruction and examination.

A Tale Of Two Reasons

[62] It is not disputed that when the respondent dismissed the articled clerkship application by letter dated 5 August 2022, the reason provided was the abolition of articled clerkship as decided in a meeting held on 8 January 1985 (the first reason).

[63] In the course of the JR proceedings, another reason was provided in the respondent's affidavit in reply affirmed on 8 February 2023 as follows (the second reason):

> 9. I am also advised by the Respondent's solicitors and verify believe that the Applicants have not complied with the requirements under the 1979 Rules. The Rules provide that:

9.1 It must be the person who seeks to enter into articles with an advocate and solicitor to produce the relevant documents under rule 3;

9.2 Among other documents to be produced would be a copy of "proposed articles"; and;

9.3 The date of registration of articles shall be when the articles are registered and not when the articles are signed/executed.

The second reason was in relation to the appellants' failure to comply with the 1979 Rules.

[64] It was contended by the appellants that the second reason was an afterthought as it was raised about six months later and should not be taken into account. It was further contended that the HC was wrong to have relied on *Gegah Optima Resources* as, in that case, no reason was provided at the time of decision and the reason was only provided during the judicial review application.

[65] In *Gegah Optima Resources*, this court ultimately found as follows at p. 294:

> [72] The learned judge did not address any of these reasons at all; taking the position that because no reasons were given at the time of the issuance of the impugned letters, a reasonable inference that the first appellant had not exercised discretion in accordance with the law, was triggered. This understanding and application of the law, too, is incorrect. *Although the reasons may not have been given at the material time of the letters, the fact remains that the reasons were made known at the time of consideration by His Lordship. Once placed before the court, we are duty bound to examine and consider those reasons with a view to ascertaining if the allegations of breaches of the rules of natural justice have been made out; that the decisions reached were devoid of reason and invalid under the Wednesbury principles and discretion must be exercised in favour of quashing those decisions.* (emphasis added)

[66] This meant that even if the reason was given later, the court is required to consider such a reason to ascertain if the allegations of breach of natural justice are made out or that the reason is invalid under the *Wednesbury* principles. What it means is that we cannot dismiss the second reason outright.

[67] In *Dr Mohd Nasir Hashim*, there were two reasons given for the refusal to register a society at the national level. At p. 37 (CLJ); p. 225 (MLJ), this was said:

> [24] Here we have a case *where the Minister relied on two grounds to deny registration of PSM at the national level. One, as I have already said, is a good reason. The other is a bad reason. In my judgment where a public decision-maker gives two reasons - a good one and a bad one - for his decision the court is entitled to uphold the ultimate decision provided that the bad reason was not the overriding consideration on which the decision is based.* The authorities on the point are legion. (emphasis added)

[68] Hence, it may well be argued that even if the first reason on the abolition of articled clerkship is found lacking, the second reason of non-compliance with the 1979 Rules can still be sustained. As an added measure, the respondent submitted that there was no contradiction between the reasons. Even if the articled clerkship was not abolished, the second appellant has still to comply with the 1979 Rules.

[69] In considering the second reason, we must not lose sight of the fact that there was already a first reason. In that sense, this differs from *Gegah Optima Resources,* where there was only one reason and *Dr Mohd Nasir Hashim*, where there were two reasons given at the time of the decision. As we are obliged to consider the second reason, we refer to *R (On The Application Of B) v. Merton London Borough Council* [2003] 4 All ER 280 as to how the second reason ought to be taken into account. At pp. 289 and 290, these were the applicable principles laid down:

> [41] In my judgment in *Nash v. Chelsea College of Art and Design* [2001] EWHC 538 (Admin), [2001] All ER (D) 133 (Jul), (2001) Times, 25 July, I sought to summarise the principles applicable to this issue.
>
> > [34] In my judgment, the following propositions appear from the above authorities: (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in [*R v. Northamptonshire CC, ex p W* [1998] ELR 291 at 299]) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the court accept subsequent evidence of the reasons. (ii) *In other cases, the court will be cautious about accepting late reasons.* The relevant considerations include the following, which to a significant degree overlap: *(a) Whether the new reasons are consistent with the original reasons, (h) Whether it is clear that the new reasons are indeed the original reasons of the whole committee, (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision.* This consideration is really an aspect of (b). *(d) The delay before the later reasons were put forward, (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully.* Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.
> >
> > [35] ...
> >
> > [36] Secondly, *the court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers* and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members.
> >
> > (emphasis added)

[70] We do agree with the HC that there was non-compliance with the 1979 Rules. The non-compliance was that the proposed articles of clerkship were executed and effective on 7 July 2022 whereas the 1979 Rules required it to come into effect on the date of registration by the respondent; the articles were not proposed as it had already been executed and effective and the required documents were submitted by the firm and not the second appellant.

[71] Even if the second reason is true, the fact remains there was a delay of six months from the day of the 5 August 2022 letter dismissing the application to the day of the second reason. The fact that it took six months for the second reason to emerge would even support the appellants' contention that this was an afterthought as this true reason should have been the one and only reason to be disclosed at the time of dismissing the application. The second reason that there was non-compliance with the 1979 Rules would in fact mean that articled clerkship had not been abolished and this would be in turn contrary to the first reason.

[72] Another factor alluded to by *Merton LBC* is the qualifications and experience of the persons involved. Here, the membership of the respondent as provided in s. 7 of the LPA are all from the legal fraternity.

[73] At its highest, the second reason only means that the appellants will not be able to obtain the relief in para. 6 for a *mandamus* to compel the respondent to register the second appellant as an articled clerk. To that extent, we agree that the respondent cannot be forced to accept an application which does not comply with the 1979 Rules.

[74] This cannot negate the first reason which is still staring at us; and our earlier finding that the abolition of articled clerkship is unreasonable and irrational still stands.

Conclusion

[75] For the above reasons, we find merits in the appeal. We allow the appeal and the order of the HC dated 16 November 2023 is set aside. We allow order in terms of encl. 8, paras. 1 to 5. We allow RM10,000 costs here and below, to the appellants subject to allocatur.